No. 20671 ✓ See Vol. 3307

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT E. McCARTHY, Successor to WALTER E. BECK, as Manager of the United States Land Office at Sacramento, California,

Appellant

v.

LEONARD E. NOREN AND HARRY C. PERRY,

Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION

APPELLANT'S RESPONSE TO PETITION FOR REHEARING

EDWIN L. WEISL, JR.,
Assistant Attorney General.

JOHN K. VAN DE KAMP,
United States Attorney,
Los Angeles, California, 90012.

RICHARD J. DAUBER,
Assistant United States Attorney,
Los Angeles, California, 90012.

ROGER P. MARQUIS,
GEORGE R. HYDE,
Attorneys, Department of Justice,
Washington, D. C., 20530.

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 20671

ROBERT E. McCARTHY, Successor to WALTER E. BECK, as Manager of the United States Land Office at Sacramento, California,

Appellant

v.

LEONARD E. NOREN AND HARRY C. PERRY,

Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION

APPELLANT'S RESPONSE TO PETITION FOR REHEARING

This reply brief is limited to the single question specified by this Court, as contained in the letter of the clerk of this Court dated January 6, 1967; that is, whether the order appealed from is an appealable order.

THE ORDER APPEALED FROM WAS A FINAL APPEALABLE ORDER

The petition implies that this jurisdictional issue is raised for the first time by the petition. This is not true.

Prior to briefing on the merits, appellees moved to dismiss the appeal on the grounds now urged. After argument, this motion was denied by order of February 9, 1966. Aside from stare decisis, this order was, we submit, plainly correct.

Appellees are arguing that, since the matter was remanded for further proceedings within the Department of the Interior, the Court's order is not a final order. But the issue is whether the remand was proper. The judgment was certainly final as to that. The position of the appellant is that the district court erred in ordering the case remanded for the holding of a hearing. The order of remand entered in this case would have required the Land Office Manager to adopt a procedure which is contrary to many years of administrative practice within the Department of the Interior. The order of remand was not entered for the purpose of giving "an administrative body an opportunity to meet objections to its order by correcting irregularities in procedure, or supplying deficiencies in its record or making additional findings where these are necessary, or supplying findings validly made in the place of those attacked as invalid." Ford Motor Co. v. Labor Board, 305 U.S. 364, 375

(1939). On the contrary, the order appealed from would have returned this matter to the Manager of the Land Office at Sacramento for the conducting of an adversary type hearing which is not required by any statute, regulation or departmental order. The correctness of the district court's order, which involves only a legal issue, would not have been affected in any way by hearings conducted under the remand.

The authorities and points presented by the appellees in support of their petition for rehearing have no relevance to the basic issue presented by this appeal. Ford Motor Co. v. Labor Board, 305 U.S. 364 (1939), holds simply that an administrative agency may request the return of a case to it to permit additional evidence to be taken, new findings to be made, or to permit some defect in the record to be supplied.

Appellees' argument proves too much. It would mean that an administrative agency could never seek appellate review of a district court holding that, in some respect, the administrative proceedings were invalid. So far as this mandamus case is concerned, the judgment of remand ends the case. In fact, because of optional venue, a further review after remand

might be in another court in another circuit.

Moreover, if appellees are right and the judgment does not determine anything with finality, the administrative authorities believing the decision to be wrong and having no right to review it, may ignore it. The absurdity of such result is apparent.

CONCLUSION

The order appealed from was clearly an appealable order.

Respectfully submitted,

EDWIN L. WEISL, JR.,
Assistant Attorney General.

JOHN K. VAN DE KAMP,
United States Attorney,
Los Angeles, California, 900

RICHARD J. DAUBER,
Assistant United States Attorne
Los Angeles, California, 900

ROGER P. MARQUIS,
GEORGE R. HYDE,
Attorneys, Department of Justi
Washington, D. C., 20530.

JANUARY 1967.